HOUSE OF LORDS.

Monday, December 16.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Davey, Lord Brampton, Lord Robertson, and Lord Lindley.)

MAGISTRATES OF HADDINGTON *v.* THOMAS BERNARD & COMPANY, LIMITED.

Burgh—Royal Burgh—Petty Customs—Charter of Confirmation, Erection, and Novodamus—Lands Included in Charter Outside Walls and Ancient Boundaries of Royalty—Through Customs—Causeway Mail.

Held that petty customs were leviable on goods entering certain lands which were included in a royal charter of confirmation, erection, and novodamus granted to a royal burgh in 1624, even although the lands in question were not within the ancient boundaries of the royalty or the old defensive walls of the burgh, and had been held since 1815 upon titles granted by the magistrates, in which it was stipulated that goods going to these lands were to pay the same custom as if they had gone "through" the burgh.

This was an action of declarator and payment at the instance of the Provost, Magistrates, and Council of the royal burgh of Haddington, and of the late tacksman of the petty customs of the said royal burgh, against Thomas Bernard & Company, Limited, maltsters, Edinburgh, owners and occupiers of malting premises at West Miln Haugh, Haddington. The question in the case was, whether the pursuers were entitled to levy petty customs upon goods entering the defenders' said malting premises at West Miln Haugh, which the pursuers maintained were within, and the defenders maintained were outside, the boundaries within which the magistrates were entitled to levy petty customs.

In 1532, disputes having arisen between the burgh of Haddington and Maitland of Lethington with regard to the ownership of the haughs upon the north and south sides of the river Tyne, and litigations upon these disputes, the parties entered into indenture dated 4th March 1532 with a view of settling these disputes and litigations, whereby it was agreed that Lethington should have the haughs on the south side of the water, and that the burgh should "bwrok & us ze est mele hauch and ye west mele hauch and all other hauches on ye north side of Tyne anent ye landes of Leithington as yair propertie and heretaig."

On 30th January 1624, upon the narrative that he and his progenitors had "of old beyond the memory of man" "erected and created our burgh of Haddington into a free royal burgh" with privileges, and had granted "the lands and other things under mentioned partly in property and partly in community," and that by means of wars, time, and several conflagrations the burgh had lost the evidences of the said burgh and privileges thereof and lands thereto annexed, King James VI. granted a charter of confirmation and novodamus in favour of the burgesses of Haddington which contained, *inter alia*, the following clauses (as taken from the translation of the charter)—"We therefore, with advice and consent &c. . . . have ratified and approved, and by this present charter and tenor thereof have confirmed, like as we ratify, approve, and for ourselves and our successors perpetually confirm, all and sundry the ancient infeoffments, erections, mortifications, charters, donations, titles, licences, and privileges whatsoever made and granted by us and our most noble progenitors to our foresaid burgh of Haddington, the burgesses and inhabitants thereof, and their predecessors and successors, together with all the lands, as well proper as common, Church lands, yearly revenues thereto belonging, privileges and immunities contained therein, and all things whatsoever contained in the same, and all privileges, immunities, markets, fairs, and other liberties which at present they have, antiently have had, and in possession whereof they have been . . . Moreover, of our certain knowledge and proper motion we have made, erected, created, constituted, and incorporated, and by the tenor of our present charter, for ourselves and our successors, with the consent aforesaid, we make, constitute, create, erect, and incorporate, all and whole our said burgh of Haddington, with all and sundry the lands, houses, buildings, gardens, acres, waste grounds, tofts, crofts, and others lying within the burgh roods and territory of the said burgh, with all and sundry the other lands, muirs, lochs, meadows, acres, yearly revenues, and others, as well of property as community pertaining to the same, into an entire and free royal burgh in all times to come, to be called as in times past the burgh of Haddington, as in times past: And we give, grant, and for ourselves and successors, with consent foresaid, for ever confirm to the provost, bailies, counsellors, and community of the said burgh and their successors, present and for the time being, hereditarily, all and whole the muir of Gladismore, with the pertinents and the highway leading to the same, lying near the liberty and territory of the said burgh, within the county of Edinburgh and constabulary of Haddington . . . Besides, we have given, granted, disponed, and by this our present charter have confirmed, and by the tenor thereof give, grant, dispone, and for ourselves and successors for ever confirm to the above-mentioned burgh, its provost, bailies, burgesses, counsellors, and community, and their successors present or for the time being, all and haill those acres of land called Runfeglenis acres, and two acres of land called Hangmans acres, and all and haill the two corn mills of the burgh of Haddington, with the multures and sequels thereof, the milne haugh and milne lands, and also the port of Aberlady in the

bay of the water of Pepher, and the common road leading to the said port, together with the house of the said burgh situated at the said port and shore, commonly called 'the town of Haddington's house,' with anchorage-moneys and other profits and dues of a free port . . . with all the revenues, customs, and other privileges and immunities anciently belonging to the said burgh of Haddington, together with all and sundry the yearly revenues and provisions whatsomever to the said burgh at any time past belonging . . . Which burgh indeed, all and whole of Haddington, and the said tenements, acres, yearly revenues, free port, anchorage, burgh's house commonly called the town house . . . and other things aforementioned formerly pertained to the said burgh of Haddington,"—[*then followed a clause narrating the resignation of the lands referred to for new infeftment.*] . . . "Moreover, for the good, faithful, and grateful service performed and paid to us and our most noble progenitors of worthy memory by our said burgh of Haddington and inhabitants thereof, we have of new given, granted, disponed, and by this our present charter confirmed, and by the tenor thereof give, grant, dispone, and for ourselves and our successors for ever confirm to the foresaid provost, bailies, town council, and community of our said burgh of Haddington, and their successors for the time being and to come, all and whole the said burgh of Haddington, and all and whole the foresaid muir of Gladsmuir, with the pertinents lying near the territory and liberties of the said burgh, within our said sheriffdom of Edinburgh and constabulary of Haddington . . . Moreover, the foresaid acres called Ranfaglenis acres and the said two acres called Hangmans acres, and all and whole the said two corn mills of the said town of Haddington, with the multures and sequells of the same, and the mill-haugh and mill-lands, and also all and whole the said port of Aberlady . . . and in like manner, with advice and consent foresaid, we will and appoint and for us and our successors decern and ordain that one sasine now, and in all time coming, taken at the Mercate Cross of our said burgh of Haddington, is and will be a sufficient sasine for the foresaid burgh, whole privileges liberties, immunities, customs, commodities, casualties, and others foresaid pertaining and belonging to the said burgh, and for the foresaid moor of Gladsmuir, Ranfeglins acres, Hangmans acres, mills, mill-lands . . . notwithstanding they do not lie together and contiguous but in different parts . . . to be holden and for to hold all and haill the foresaid burgh of Haddington, moor and lands of Gladsmuir . . . and all and haill the foresaid acres called Ranfeglins acres and Hangmans acres, mills, mill-lands called mylne-hauch . . . seaport of Aberlady, anchorage dues, burgh house called towneshous, ways, passages, and all other privileges, liberties, immunities, customs, commodities, casualties, and others foresaid, belonging and pertaining thereto, together with all the other lands and annual rents belonging and pertaining to the said burgh, liberty, and territory thereof, by the foresaid provost, bailies, councillors, and community of the said burgh of Haddington and their successors, of us and our successors, in free burgage, fee, and heritage for ever, according to all its ancient marches and divisions as they lye in length and breadth."

The charter from which the above excerpts are taken was the earliest charter of the burgh now extant. Of the different parcels of land mentioned in the charter the muir of Gladsmuir lay four miles to the west of Haddington. Runfeyglenis acres were admittedly to the west of and outwith the burgh boundaries, the port of Aberlady was six miles distant, and part at least of the Hangmans acres were not within the limits of the burgh. Whether the west miln haugh was within the ancient boundaries of the burgh was one of the questions in this case. In the view taken by the Judges it was not necessary to decide it definitely. Apparently the west miln haugh was not within the ancient defensive wall of the burgh. The natural boundary of the burgh at that point is the river Tyne, which encloses the south and east sides of the burgh in a loop. The west miln haugh was within this natural boundary. Whether it was within the ancient boundary of the burgh at this point or not, it was at least contiguous to the burgh, and not separated from it by intervening lands.

By tack dated 17th October 1815 the Magistrates of Haddington let to Archibald Dunlop, distiller in Linton, and his heirs — "All and whole that field and enclosure belonging to the said burgh lying near the West Mill of Haddington, and commonly known by the name of the West Mill Haugh," for the space of twice ninety-nine years as from Martinmas 1815, for the purpose of erecting, and under obligation to erect, a distillery thereon. This tack containd the following clause:—"And as the said Magistrates and Council are to use their interest in obtaining a proper road to the said field from the present Pencaitland Road, it is to be expressly understood that grain and other articles going to the intended distillery by that road are to pay the same custom as if they had gone through the burgh."

In the minute of the meeting of the Town Council at which the proposed agreement for this tack was considered, the head of the proposed agreement with regard to customs was as follows:—"IV. The Town Council to use their interest with the proprietors to get a proper road from the Pencaitland Road. The grain and other articles carried to the distillery by this road to pay the usual customs as paid going to the town."

Since the date of the agreement with Maitland of Lethington the west miln haugh had been without dispute owned, and prior to the date of the tack above mentioned, occupied by the burgh of Haddington. It had been used as a public bleaching-green. At the date of the tack there was no means

of access to the west miln haugh from the west, and consequently goods coming from the west had to pass through the burgh west port and the burgh south port, and so by the mill wynd to the west miln haugh.

By feu-disposition dated 22nd July 1826 the Magistrates of Haddington disponed the lands above mentioned, which were leased to Archibald Dunlop, and upon which Dunlop had meantime erected a distillery, to Archibald Todrick. In this deed the lands disponed were described as follows:—"All and whole that field or enclosure belonging to the said burgh lying near the West Mill of Haddington, and commonly known by the name of the West Mill Haugh lying within the parish and sheriffdom of Haddington, as the same is presently possessed by Archibald Dunlop, distiller in Haddington."

By this feu-disposition it was, *inter alia*, provided and declared "that grain and other articles going to the distillery by the road leading to the same from the Pencaitland Road shall be subject to the same customs as if they had gone through the burgh.

The defenders in the present action, Thomas Bernard & Company, Limited, were now in right of this feu-disposition, the original firm of Thomas Bernard & Company which they represented having acquired the subjects in 1872.

From 1815 the dues and customs exigible by the usage of the burgh had in fact been levied and paid upon goods coming into and going from the miln haugh.

By the usage of the burgh of Haddington (1) the through customs and the incoming customs were identically the same in amount, and (2) both these customs were not exigible on the same load of goods, but only one or other.

From 1872, when they acquired the subjects, down to 16th May 1898, Messrs Bernard and the said limited company paid without demur the dues and customs in respect of their premises as these dues were detailed in the amended table of the burgh's customs. On 16th May 1898 Thomas Bernard & Company, Limited, declined to pay any further dues on grain or other goods coming into or going from their premises at West Miln Haugh.

Thereupon the Provost, Magistrates, and Councillors of the royal burgh of Haddington, and James Thomson, late tacksman of the petty customs and dues belonging to the said royal burgh, raised the present action against Thomas Bernard & Company, Limited, in which the pursuers concluded for declarator (1) that the magistrates were entitled "to exercise the whole privileges, immunities, and liberties of a royal burgh within the royalty, liberty, and territory of the same, and within such further or other area as by ancient usage said privileges, immunities, and liberties have been in use to be exercised by the said Provost, Magistrates, and Council or their predecessors in office, including among said privileges, immunities, and liberties the right to levy the whole customs, duties, dues, or other imposts as the same are detailed in the amended table of the customs of the burgh of Haddington dated 1849;" (2) that the magistrates were "entitled to exercise their said rights and others over the premises belonging to or occupied by the defenders, situated respectively at Tyneclose, Newtonport, and at the Old Bleachfield of the West Miln Haugh of Haddington, now known as the Old Distillery Buildings or Bernard's Maltings, and in particular are entitled to levy the customs and dues as laid down in said amended table upon all goods, articles, and things as therein enumerated coming into or going from said premises"; (3) that the pursuer Thomson as tacksman was entitled to payment of said customs due by the defenders during his period of let; and further, for decree ordaining the defenders to pay to the pursuer Thomson as tacksman the sum of £42, 10s. 9d., being the amount of customs outstanding and due by the defenders as at 15th May 1899 in respect of certain goods coming into or going from their said premises.

The defenders admitted liability for the sum of £3, 5s. 1d. claimed in respect of goods coming to or going from the defenders' premises at Newtonport and Tyneclose, but *quoad ultra* denied liability.

The defenders, *inter alia*, averred as follows:—"The right to levy customs in Haddington is strictly confined to the area within the boundaries of the royal burgh, and as the defenders' premises at West Miln Haugh are situated outwith the said boundaries, they are not liable for said customs in so far as claimed in respect of goods coming into or going from these premises. The municipal boundaries have been from time to time extended outside the royal boundary, but the right to levy customs has not and cannot be so extended, and the customs are therefore still collected at the old ports or gateways of the town. The customs hitherto paid by the defenders or their predecessors in respect of goods coming into or going from the said premises have been through customs or causeway maills and not incoming customs, and the first-named pursuers' right to levy the same fell with the abolition of causeway maills in 1879 by sec. 33 of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51). The pursuers have since 1887 assessed the said subjects in lieu of through customs, and have also since that date assessed them for the repair of the streets."

The pursuers pleaded—"(1) The pursuers the Provost, Magistrates, and Council, as representing the royal burgh of Haddington, are in virtue of the before-mentioned charter and of immemorial usage entitled to levy dues and petty customs on all goods, grain, and others brought into and consumed within the burgh of Haddington, ancient royalty and territory thereof, or any portion thereof, in terms of their customs table, and these pursuers are entitled to decree in terms of the declaratory conclusions of the summons with expenses. (2) The defenders as proprietors or occupiers of subjects situated within the burgh of Haddington, ancient royalty and territory

thereof, are liable in the customs exigible under said charter and immemorial usage as the same are detailed in the customs table of said burgh. (3) The defenders and their authors having paid without demur said customs since 1815 are debarred *personali exceptione* from now objecting thereto. (4) The sum of £42, 10s. 9d. being due and resting-owing to the pursuer James Thomson, as tacksman foresaid, decree should be pronounced in his favour as concluded for with expenses."

The defenders pleaded, *inter alia*—"(2) The first-named pursuers' right to levy the dues and petty customs being confined to the area within the boundaries of the royal or old burgh of Haddington, and the defenders' premises at West Miln Haugh being outwith the said boundaries, the defenders are entitled to absolvitor. (3) The customs claimed by the pursuers in respect of goods coming into or going from the defenders' premises at West Miln Haugh being causeway maills or through customs, and causeway maills having been abolished by the statute condescended on, the defenders are entitled to absolvitor."

Proof was allowed and led, but in view of the grounds upon which the Judges' opinions were based, it is not necessary to refer further to the nature of the facts disclosed by the evidence.

On 7th March 1900 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"The Lord Ordinary having considered the closed record, proof, and productions, Decerns against the defenders for the sum of £3, 5s. 1d. sterling admitted to be due in respect of goods brought to the defenders' premises at Newtonport and Tyneclose: *Quoad ultra* sustains the third plea-in-law for the defenders, and assoilzies them from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—"The question in this case is whether the royal burgh of Haddington has still the right to levy petty customs on goods coming to or going from the premises belonging to the defenders, called Distillery Park, and lying beside the river Tyne. The answer of the defenders is that although customs have in fact been levied on such goods since the year 1815, when the subjects were first acquired from the burgh by their predecessor, the terms of the agreement then made clearly show that the parties contracted on the footing that the subjects were not within the ancient royalty, and that the customs to be levied were not petty customs in the proper sense of the word, but through customs, which are now abolished by statute. This answer, of course, involves the admission that since 1884, when through customs ceased to be leviable in Haddington, the defenders have been paying by mistake; but they account for that by saying that it was not till the decision in *Graham* v. *Magistrates of Perth* (23 R. 602) that their attention was called to the illegality of levying petty customs outside the ancient boundaries, though within the extended area, of a royal burgh.

"I have come to think with the defenders that the question really depends on the contract made with their predecessors in 1815, and that it does not directly raise any of the antiquarian topics which were discussed in the proof and at the debate. If it were necessary to decide these, it might be very difficult to say what were the precise boundaries of the royal burgh of Haddington. The charter of 1624 does not define them; but the town was at one time a walled one, and the line of the old wall can still be traced with tolerable certainty, although only fragments of it remain here and there. There were ports in the wall at which the petty customs were collected, and in all probability no goods were taxed except those which passed through the ports. Indeed, the customs are still described in the table issued by the magistrates, and in the articles under which they are let, as leviable at the ports. If so, the boundaries of the burgh, so far at least as petty customs were concerned, would in ancient days be defined by the wall. But the burgh undoubtedly possessed property outside the walls, including the very subjects which are here in question, and including also some areas of land at a considerable distance from the town. Admittedly, there was nothing to prevent the town from acquiring by usage the right to levy customs within these extra-mural parts of its property. In 1842 the town council then in office laid down upon a plan the boundaries of the royalty by a line which included the subjects in question. They did so upon the express ground that doubts about the boundaries had occurred and might recur. But if for forty years they had continued to levy customs within the boundaries so defined on no other title than their charter and plan, I hardly think that their right to do so could afterwards have been challenged.

"As regards the defenders' premises, however, the right to levy customs depended not upon the plan of 1842 but upon the contract of 1815. At that time we do not know what was the general belief as to the boundaries of the ancient royalty. The matter may then perhaps have been in the same state of doubt as it was immediately prior to 1842. What we do know is that the ground on which the defenders' buildings now stand was vacant ground, which had apparently been used as a public bleach-field for the town, and that it formed part of the 'Miln Haugh and Miln Lands' which had been conveyed by the charter of 1624, by a clause altogether distinct from that which granted the proper 'territory' of the burgh. We also know from the minutes of the town council that a certain Mr Dunlop applied for a feu or long lease of the ground for the erection of a distillery, and that the negotiations resulted in the tack set out in the joint print.

"The important part of this tack is a clause in the following terms:—'And as the said Magistrates and Council are to use their interest in obtaining a proper road to the said field from the present Pencaitland Road, it is to be expressly understood that

grain and other articles going to the intended distillery by that road are to pay the same custom as if they had gone through the burgh. In 1826 the tack was converted into a feu-right, in which the subjects are described as 'all and whole that field or enclosure belonging to the said burgh lying near the West Mill of Haddington, and commonly known by the name of the West Mill Haugh, lying within the parish and sheriffdom of Haddington.' Then there is a declaration that the feu-disposition is granted under burden of the whole conditions and reservations expressed in the tack, 'which conditions and reservations shall be as binding as if this feu-disposition had not been granted,' and in particular that 'grain and other articles going to the distillery by the road leading to the same from the Pencaitland Road shall be subject to the same custom as if they had gone through the burgh.'

"Now the situation of the field in 1815 was such that no cart traffic could approach or leave it except by the Mill Wynd, and the Mill Wynd led straight to the South Port of the burgh, unless you turned along the road called 'Poldrate' to a ford where Waterloo Bridge now stands. Accordingly Mr Dunlop stipulated that the town council should assist him in getting a new road made from the Pencaitland Road. But the effect of this was that traffic coming from the west instead of having to enter the West Port and go right through the town to the South Port, and so by the Mill Wynd to the distillery, would in future avoid the ports of the town altogether, and therefore it was natural that the town council should desire that their co-operation in making the new road should not deprive them of the customs which they would otherwise receive. If the site of the new distillery was within the royalty, it was quite unnecessary to say anything about the matter; but if the field was not within the royalty, or was treated by the contracting parties as not within the royalty, then the whole stipulation becomes perfectly intelligible. Mr Campbell for the pursuers urged that the words to be emphasised in the clause are the words 'by that road.' I agree, because it was the making of the road that led to the insertion of the clause. But on the hypothesis that the site was known or supposed to be extra-burghal, the effect of the clause was just this—on goods coming from the south, *i.e.*, by a ford on the river, no custom, because the royalty was never entered; on goods coming from the north or east, custom of course, but no need to stipulate for it, because the South Port and one other must both be passed; but on goods coming from the west, something in lieu of custom, because if no stipulation were made these goods would escape altogether. And as time went on the goods coming from the west included all that arrived by rail, and formed the great bulk, if not the whole, of what were sent to the distillery.

"If that was the real meaning of the clause—and I am unable otherwise to account for its insertion—then the customs to be levied were through customs and nothing else. It seems to me that the whole surrounding circumstances support that view. The words themselves distinctly suggest it. The custom payable is to be the same as if the goods had gone 'through the burgh.' Etymologically the word 'through' means from end to end—in at one end and out at the other. Then the manner in which the road was made tends in the same direction. The burgh contributed the ground, but it did not form the road, as it would undoubtedly have done if the burgh boundary had been thought in 1815 to be the line adopted in 1842. The work was undertaken by the general turnpike trustees, who set up a bye-bar at the west end of the road to recoup themselves for their outlay.

"I do not find anything inconsistent with all this in the fact that subsequent to 1842 draff has been carted from the distillery, and gravel has been carted from the river, to places in the town without paying custom. Nor do I think that the least light is to be derived from descriptions in the titles of adjoining subjects. The titles of this property say nothing of its being within burgh, and some of those which are described as 'within the royalty' or 'within the liberties of the burgh,' are far outside the line of 1842. The fact that Mr Dunlop, the tacksman of 1815, became provost of the burgh and described himself as a 'burgess and actual trader' within it, goes no length in proving that his distlliery was within the royalty, because for aught we know, he may have been made a burgess, or have had other trading premises in the town. Perhaps the most plausible bit of evidence in support of the burghal theory, because the most nearly contemporaneous with 1815, is derived from the fact that when the Parish Church was remodelled in 1812 the cost was borne, and the seats were allocated, in the proportion of four-fifths to the landward heritors and one-fifth to the burgh. The one-fifth in money was paid out of burgh funds, and the claim of individuals within the burgh to separate sittings was rejected, the magistrates being left to allocate these as they thought fit. It is true that no assessment was paid, and no seats were allocated, in respect of the subjects in question. But exactly the same thing might be said of the lands of which the burgh was still at that date the proprietor in another part of the parish, and of which nobody asserts that they were within the royalty. In short, this evidence only proves what everybody admits, that the property belonged to the town.

"My conclusion on the whole matter is that the ground in question was originally granted to the burgh, not as part of its proper 'territory,' but on the same footing as the other parcels of land admittedly outside the ancient royalty; that before 1815, when it was vacant ground, there is no evidence that petty customs were ever levied in respect of it; that in 1815 it was believed to be, or at all events was treated as being so far as petty customs were concerned, outside the royalty; that the cus-

toms admittedly paid from 1815 to 1884 were through customs which ceased in the latter year to be exigible; and that the defenders are not precluded by the circumstance of their having gone on paying in error since that date from challenging their liability to pay in future. Even if I thought the question more doubtful than I do think it, I should be disposed to apply a somewhat strict rule of construction to the contract of 1815, as imposing a kind of liability which is of the nature of a tax on commerce without any corresponding advantage. Accordingly I shall give decree for the sum of £3, 5s. 1d., admitted to be due in respect of goods brought to the defenders' premises at Newtonport and Tyneclose, and *quoad ultra* I shall sustain their third plea-in-law, and assoilzie them with expenses."

The pursuers reclaimed.

The arguments of the parties sufficiently appear from the judgments.

At advising—

LORD JUSTICE-CLERK — The pursuers, who are the Corporation of the burgh of Haddington, seek by declarator to establish their right to exact from the defenders those customs dues which they have been in use to exact from those bringing goods into the burgh. The defenders resist the demand on the allegation that their premises to which the goods are taken are not within the boundaries of the burgh of Haddington, and that therefore they are not liable. They do not dispute that formerly they did pay customs dues on such goods, but they deny that such payments were of the nature of petty customs for goods entering the burgh, maintaining that they were "through customs" levied on goods passing through the burgh, the duties being of the class of causeway maill. They maintain that as by recent legislation tolls for the use of roads were abolished, including the causeway maill exacted by burghs for the maintenance of their streets within burgh, the right of the pursuers to exact dues from them has ceased and determined.

The question therefore turns upon whether the defenders' premises are within the burgh or not. I have come to be of opinion that the pursuers have established that they are within the burgh. The King, by charter of novodamus and confirmation in 1624, confirmed and ratified all that had been granted to the burgh of Haddington in the past, constituted, created, erected, and incorporated the burgh "with all and sundry lands, houses, buildings, gardens, acres, waste grounds, tofts and crofts, and others lying within the burgh roods and territory of the said burgh, with all and sundry the other lands, muirs, lochs, meadows, acres, yearly revenues, and others as well of property as of community belonging to the same . . . into a free and royal burgh in all times to come, to be called as in times past, the burgh of Haddington as in times past." The charter further granted and confirmed to the burgh, *inter alia*, the corn mills of the burgh and the milne haugh and milne lands.

The right of the burgh to these lands in question was thus given and confirmed by royal charter, and being lands then lying within the territory of the burgh at that date, as indicated by earlier titles, they formed from that date at least part of the royal burgh of Haddington. If any doubt had previously existed on these older titles, prescriptive possession under the charter of 1624 would bar any challenge on such a ground. That they were dealt with as being in the burgh cannot I think upon the evidence in this case be doubted, and it is a remarkable fact in connection with the subject-matter of the present litigation, that while gravel from the riverbed on the other side of the *medium filum* from the mill lands paid customs dues on entering the burgh, no such exaction was made on gravel taken on the side where the burgh was the proprietor of the lands, these lands being held to be within the burgh.

If there were nothing else in the case, it may be doubted whether any plausible case could be maintained by the defenders. But certain circumstances evidenced by documents in the case are relied on to establish that this property was treated as being outside the burgh, and that the dues paid must be held to have been causeway mail. It appears that the proposing tenants of the lands in question were desirous of getting a more convenient access to their works than by the existing roads, the use of which compelled them to make a long roundabout passage through the town. The Burgh Council were willing to aid in this, and to give their good services towards securing a piece of land which would enable a direct road to be made for the use of the tenants. But in giving their assistance they stipulated that grain and other articles going to the distillery were to pay the 'same custom as if they had gone through the burgh.' This, it is maintained, establishes that what had been paid before was causeway mail, and not burgh petty customs. I do not think that such words occurring in a tack can be held to affect the rights of the burgh under their charter if these are distinct. But even if the words are to be considered as important, and as being words which could be looked at in construing the title, I see no ground for holding that the meaning attached to them by the defenders must be accepted. I think that the word "through" is used in a similar popular sense as in the same deed the word "to" is used. These goods are spoken of as coming "to" the burgh—that means beyond doubt entering the burgh, and does not mean either coming "to" the burgh but not entering it, or coming to the burgh but going through it and passing out at the other side. Further, the customs dues were in use to be collected at the ports of the burgh, which was at one time a walled town, and it might be quite natural to speak of traffic which entered by a port and passed to the other side of the burgh as "going through" the burgh, in contradistinction

to traffic which by this new road was to skirt the burgh, and not in any sense passing through it, indeed not even entering it, until it reached the defenders' premises. I am therefore unable to attach any weight to the terms of this tack, even if such a document could affect the rights established by the royal charter of novodamus and confirmation, which is, as I think, conclusive of the question.

Therefore, differing from the Lord Ordinary, I hold that the pursuers are entitled to the declarator which they ask for.

LORD YOUNG—I concur, and the only observation I have to make is that I am satisfied upon the evidence before us that the defenders' premises and property are within the burgh of Haddington. If that is so, it follows necessarily that the pursuers are entitled to decree.

LORD TRAYNER—The decision of this case depends on the answer to be given to the question whether the lands now belonging to the defenders, and on which their works are erected, form part of the ancient royalty of the burgh of Haddington. The Lord Ordinary has answered this question in the negative, and founded his opinion upon a clause contained in a tack of said lands dated in 1815 between the burgh authorities and the defenders' predecessors —a clause which also appears in the feu-disposition of the same lands dated in 1826, which forms, as I understand, the basis of the defenders' title. It appears to me that the decision of the question before us depends more upon the terms of the royal charter of 1624, to the terms of which the Lord Ordinary does not advert in the opinion which he has given, rather than on the terms of the deeds on which the judgment now under review entirely proceeds. I cannot concur in that judgment, and shall state the grounds on which I have come to a different conclusion.

The charter of novodamus and confirmation granted by King James in January 1624 proceeds upon the narrative that the burgh of Haddington had been erected and created a free royal burgh by the King's progenitors at a time "beyond the memory of man," but that the titles to the burgh and lands thereto annexed had been lost or destroyed in the circumstances and by the causes there described; and after approving and confirming, *inter alia*, the ancient charters and infeftments granted to the burgh, the charter proceeds thus—"Moreover, of our certain knowledge and proper motion, we have made, erected, created, constituted, and incorporated, and by the tenor of our present charter, for ourselves and our successors, with the consent aforesaid, we make, constitute, create, erect, and incorporate, all and whole our said burgh of Haddington, with all and sundry the lands, houses, buildings, gardens, acres, waste grounds, tofts, crofts, and others lying within the burgh roods and territory of the said burgh, with all and sundry the other lands, muirs, lochs, meadows, acres, yearly revenues, and others, as well of property as community, pertaining to the same, into an entire and free royal burgh in all times to come, to be called as in times past the burgh of Haddington." It appears to me that the language of that clause is plain enough, and leaves no doubt as to its purpose and effect. What was created into a free royal burgh was not only what had been under former charters the "roods and territory of the said burgh," but also "all and sundry *the other lands* . . . as well of property as community pertaining to the same." Whatever had been the limits of the ancient royalty, the erection by King James included as within the territory of the burgh all the lands belonging in property to the burgh at the date of the charter I have quoted from. Now, the lands in question certainly belonged in property to the burgh long before 1624. They may have been within the limits of the ancient royalty for all we know or can now ascertain, but being the property of the burgh in and before 1624, they were at all events then included within the royalty of the burgh as then erected. Although the titles to the land in question have been lost, there remains one writ, which is sufficient to establish what I have said, that these lands were held in property by the burgh prior to 1624. I refer to the agreement or indenture between the burgh and Maitland of Lethington in 1532. From that writ it appears that in or before the year 1532 Maitland of Lethington claimed the haugh lands on both sides of the river Tyne as pertaining to his lands of Lethington, while the "bailies, council, and community of the said burgh" claimed the haugh lands on the north side of the river (called the mill-haugh) as "pertaining to them and their successors as proper in common and heritage to the town." It further appears that these contending claims had led to an application on the part of each claimant to the "Lords of Council" to have the boundaries of their respective properties fixed and determined. The writ I am now considering embodies the terms on which the contending claimants adjusted their differences, and the agreement come to was this—(1) that the haugh on the south of the river should be held as belonging to Lethington, the town renouncing all claim, right, or title thereto; (2) "that the said bailies, council, and community, and their successors shall brook and use the East Mill Haugh and the West Mill Haugh and all other haughs on the north side of Tyne anent (opposite) the lands of Lethington as their property in common and heritage," Lethington renouncing all claim thereto "for now and ever"; and (3) that the said water (the Tyne) should be the march between the respective properties "in time to come." The mill haughs on the north of the Tyne, thus declared to be the property of the town, include the lands now belonging to the defenders. These lands have been held by the burgh ever since that date, so far as we know, without any challenge of their title, and being their undisputed property in 1624, were part of the lands erected into a free royal burgh at that date. The presumption is, I think, in

favour of the view that these lands were included within the limits of the burgh under the older charter of erection. But however that may be, I think it is enough for the present case to say that the lands in question were the property of the burgh in 1532, and from that date until 1624, when all the lands and other heritages belonging to the burgh were erected into a royal burgh by King James. It was argued against this view that if the title of the burgh to the haugh lands on the north side of Tyne had been clear in 1532 these lands would not have been claimed by Lethington. But that argument presents no difficulty. We know historically that in 1532, and both before and after that date, a written title did not protect owners of lands against demands which could be enforced by the strong hand. But more probably the claim by Lethington was made to the haugh lands as pertinents of his estate, because the titles of the burgh had been lost or destroyed in the civil commotions and conflagrations to which the royal charter alludes. There was then no proper register of sasines (which did not come into existence practically until 1617) to appeal to. If the title itself was lost or destroyed there was no way of supplying its place. And that leads me to notice another argument urged by the defenders. By the royal charter of 1624 there is conveyed to the burgh the "milne haugh and milne lands" (which are the same presumably as those referred to in the indenture of 1532) as well as other lands severally designed. From this it is argued that the lands so conveyed were not the lands of the burgh before that conveyance; that they were additional to the lands erected into a burgh; that as there are other lands which the royal charter purports to convey (locally distant from the town of Haddington), which are not part of the burgh territory proper, the milne haugh lands must be dealt with as being in the same category with those other lands, and therefore not included within the royalty. The first thing to be observed about this argument is that it proceeds upon the assumption that the lands (other than the mill haugh) are not part of the royalty. That is not an assumption the defenders are entitled to make. It is based solely upon the fact that the several lands conveyed are discontiguous. But contiguity is not a necessary condition of their being part of the royalty. For anything that appears to the contrary the whole of these lands may be part of the royalty. But apart from that there is a sufficient explanation of the conveyance of the haugh lands in the charter of 1624. The conveyance there made in form is not an original grant of the mill haughs to the burgh. They were as we have seen claimed by the burgh, and acknowledged by the coterminous proprietor to be the property of the burgh nearly a century before the charter was granted. The charter of 1624 was a charter of novodamus and confirmation, and one does not look for an original grant in such a deed, although no doubt it might competently enough contain such a grant. But the primary (and most frequently the only) purpose for which such a charter is granted is either to fortify a doubtful title or to replace a lost one so as to form the basis for a prescriptive title. The latter was most probably the purpose which the charter of 1624 was meant to serve, namely, to supply the place of the older titles which had been lost or destroyed, and by prescription following thereon to exclude for the future any such challenge of their right as had been made by Maitland of Lethington. The words of conveyance therefore in the charter of 1624 do not even suggest to my mind that the mill haughs were not the property of the burgh long before the date of that charter, apart altogether from the information on that subject which the indenture of 1532 affords. The result therefore which I reach upon the burgh titles is, that the lands in question were the property of the burgh in and prior to 1624, and that they were then (if not before) made part of the royalty.

I come now to consider the ground on which the Lord Ordinary has reached a different conclusion. In 1815 a Mr Dunlop applied to the town authorities for a lease of the haugh land on the condition, *inter alia*, that they would assist him "in providing a proper road from the Pencaitland Road to the west of the field." To this condition the town agreed, with the addition that "the grain and other articles carried to the distillery by this road to pay the usual custom as paid going to the town." In the formal lease which was granted to Mr Dunlop this addition was embodied, for it was provided that as the town was to use its interest in procuring the formation of the road desired by Mr Dunlop, "it is to be expressly understood that grain and other articles going to the intended distillery by that road are to pay the same custom as if they had gone through the burgh." When the ground came to be feued in 1826 the same condition was inserted in the feu-disposition. Now, the point which the defenders make upon this condition (and to which the Lord Ordinary has given effect) is this, that there is there an acknowledgment that the haugh lands were outwith the burgh, inasmuch as it stipulates for custom to be paid as if the goods passed through the burgh—that is, through the burgh to a point beyond the burgh—and that if the lands were not extra-burghal, the clause was superfluous. I confess I should not have considered this clause as of much importance had the Lord Ordinary not taken an opposite view. But the fact that his Lordship has thought it sufficient to overthrow the claim of the burgh shows that the clause is deserving of more consideration than I should otherwise have been disposed to give it. I think, however, full effect may be given to it without interfering with the pursuers' rights. In the first place, if the clause was superfluous, then I say *superflua non nocent*. Secondly, when the clause says, "through the burgh," it uses language which is popular but

inexact. To say that such a one went "through" the town does not mean that he went in at one boundary and out at another; it means that he perambulated the town or the greater part of it; that he went through the streets of the town. And while of course the words of the lease and feu-disposition cannot be modified by the language of the antecedent arrangement, that arrangement may be referred to as throwing light on what was meant. Accordingly if we look at the Minute of Town Council (12th August 1815) at which they agreed to Mr Dunlop's proposal, we find that what they stipulated was that custom should be paid on articles going to the distillery in the same way as articles "going to the town." Taking that with absolute literalness, it means articles going to the boundary, but not entering the town—anything going to the town but not into the town. That, however, was certainly not the meaning which the words were intended to bear, any more, in my opinion, than that the word "through" meant entering the town at one point and going out at another. Thirdly, the clause seems to me to have been intended simply to reserve or protect the town's right to certain customs, and in effect amounted to nothing more than this—that as formerly goods going to the distillery paid certain customs to the town, and the carrying of such goods by way of the new road, instead of through the streets of the burgh as formerly, should not prejudice the rights of the town to exact customs in the same way as if the new road had never been formed. But whatever may be thought of the language of this clause, it affords no good answer to the pursuers' position on their titles. If the royal charter bears the interpretation which I have put on it, then the lands in question are part of the royalty, and the words "to the town" or "through the town" cannot take away the right and title which the royal charter conferred.

I have not alluded to the parole evidence—first, because I think it cannot affect the written title; second, because that evience relates to a date subsequent to the feu-disposition of 1826; and third, because anything proved by it might probably be as readily referred to property belonging to the burgh but outwith the royalty as to property within it. At the same time it may be remarked for what it is worth, that according to general repute for a period beyond the memory of man the haugh lands in question have been regarded as within the royalty, and treated as such.

The amount claimed by the pursuers under the petitory conclusions of the summons is admitted to be correct if the defenders were responsible for it.

I am of opinion that the pursuers are entitled to decree as concluded for.

LORD MONCREIFF—Except as regards the defenders' premises at Newtonport and Tyneclose, liability in respect of which the defenders do not dispute, the pursuers have, in my opinion, failed to prove their case. In order to succeed they were bound to establish that the defenders' lands situated at West Mill Haugh, on the north bank of the river Tyne, lie within the ancient limits of the royal burgh of Haddington, or at least within such further area as by ancient usage has been subjected to the same customs as the burgh itself. This, in my opinion, they have failed to do. They have not shown by any of the documents produced that the West Mill Haugh lies within the ancient boundaries of the royal burgh of Haddington, and they have also failed to prove that by ancient usage the privileges, immunities, and liberties of the royal burgh, including right to levy customs, have been exercised in respect of the said lands.

I shall state as shortly as I can the grounds of my opinion. At the outset it may be observed that the burden lies upon the pursuers, not merely because they are *in petitorio*, but because the title on which the defenders hold the subjects, and which was granted by the pursuers' predecessors in office, proceeds on the assumption that the lands lay outside the burgh boundaries. I assume in the meantime that notwithstanding the terms of the defenders' title, the pursuers would be entitled to succeed if they could establish that their predecessors were in error in supposing that the West Mill Haugh lay outside the burgh boundaries. But it certainly makes the proof of this more difficult, that when the tack in favour of Archibald Dunlop was granted in 1815, and when the feu-disposition which followed was granted to Archibald Todrick in 1826, the pursuers' predecessors were in the belief that the lands lay outside the burgh boundaries.

By far the most important evidence is to be found in the documents founded on. If Lord Trayner's construction of those deeds is right the defence undoubtedly fails.

The first deed to which we were referred was an indenture between the burgh of Haddington and Richard Maitland of Lethington "as to hauchs on the Tyne," dated 4th March 1532. On that deed I would only observe, first, that the hauchs on the north side of the Tyne, including the West Mill Haugh in question, are not described as lying within the burgh of Haddington; and secondly, that the question in dispute was merely as to the right of property in these "hauchs," and that even as regarded that there was then a dispute which would probably not have existed if the ground had been known to be clearly within the walls or recognised boundaries of the burgh.

The next deed is the royal charter of confirmation and novodamus granted by King James VI. in favour of the burgesses of Haddington, dated 13th January 1624. If the pursuers could have shown from the terms of this deed that the mill haugh was at that time recognised as part of and within the burgh of Haddington, their case would (on the assumption which I am making in their favour) have been established. But I do not so read the deed. The mill haugh and mill lands are indeed expressly mentioned in the deed, not in con-

nection with the burgh proper, however, but in a different category, viz., among certain outlying subjects which belonged in property to the burgh but undoubtedly were not within its boundaries. Thus the scheme of the deed excludes the view that the mill haugh was within the royal burgh.

The deed commences by the King confirming all and sundry infeftments, erections, mortifications, charters, &c., made by his noble progenitors to the burgh of Haddington, and all "privileges, immunities, markets, fairs, and other liberties which at present they have, antiently have had, and in possession whereof they have been." Then the deed proceeds to erect the burgh of Haddington "with all and sundry the lands, houses, buildings, gardens, acres, waste ground, tofts, crofts, and others lying within the burgh roods and territory of the said burgh, with all and sundry *the other lands*, muirs, lochs meadows, acres, yearly revenues, and others as well of property as community pertaining to the same, into an entire and free royal burgh in all times to come, to be called as in times past the burgh of Haddington, as in times past."

Then follows a grant and confirmation of a number of subjects which are separately described—(First) the muir of Gladismuir "lying near the liberty and territory of the said burgh; (secondly) those acres of land called Runfeglenis acres; (third) "two acres of land called Hangman's acres;" (Fourth) "All and haill the two corn mills of the burgh of Haddington, with the multures and sequels thereof, the milne haugh and milne lands; and (fifth) the port of Aberlady in the Bay of the Water of Pepher, and the common road leading to the said port, together with the house of the said burgh situated at the said port and shore commonly called the town of Haddington's house, with anchoragemonies and other profits and dues of a free port." Then follows a grant of markets and fairs within the said burgh, and all other places thereabout according to use and wont, "with all the revenues, customs, and other privileges and immunities antiently belonging to the said burgh of Haddington."

Now, of the different parcels of land which are specifically described, all (leaving out of view the mill haugh and mill lands) were, with the doubtful exception of part of Hangman's acres, always treated as not being within the boundaries of the burgh. The muir of Gladismuir lay four miles to the west, Runfeglenis acres were admittedly to the west and outwith the burgh boundaries, the port of Aberlady lay at least six miles away, and part at least of Hangman's acres were not within the limits of the burgh.

The mill haugh and mill lands being specially described and grouped along with these other subjects, the inference is strong that they were placed in that category because although they belonged to the burgh they lay beyond the royalty. If they had been within the burgh it would not have been necessary or in accordance with practice to describe them separately.

This scheme of distinguishing the burgh proper from the rest of the outlying subjects which belonged to it is observed throughout the rest of the deed. For instance, in the clause of novodamus the King of new gives and for ever confirms to the magistrates the said burgh of Haddington and all and whole the foresaid muir of Gladismuir, and then follows a detailed list, as before including the mill haugh and mill lands. They are again enumerated in connection with the sasine. One sasine is to be sufficient for "the foresaid burgh," "and the foresaid moor of Gladismuir . . . mill lands, &c."

Then in the *tenendas* clause we find "burgh of Haddington, moor and lands of Gladismuir, mill lands called Myln Hauch, together with all other lands, &c., pertaining to the burgh."

It is said that the mill haugh and mill lands must be held to be included in the general words "other lands" which occur in the clause of erection. In my opinion, this construction is excluded by the remainder of the deed. The words are general—not "the other lands hereinafter described." The same general words occur in the *tenendas* clause after express mention of the mill lands. Lastly, if wide enough to include the west haugh they are wide enough to include the muir of Gladismuir and other subjects which were admittedly not within the burgh.

I am therefore of opinion that so far from establishing that the mill haugh in 1624 lay within the burgh, the charter shows that it lay outside.

The next deeds of importance which we have to consider are the tack of 1815 and the feu-disposition of 1826. Those deeds are of importance on account of the clause which they both contain—"And as the said Magistrates and Council are to use their interest in obtaining a proper road to the said field from the present Pencaitland Road, it is to be expressly understood that grain and other articles going to the distillery by that road are to pay the same custom as if they had gone through the burgh." That is the clause in the lease, and the clause in the feu-disposition is practically the same.

Previously goods coming to the miln haugh from the direction of the Pencaitland Road required to pass through the burgh. The new road proposed was to run wholly outside the burgh, and thus, if the haugh was also outside, goods coming that way would escape through customs. But if the haugh was within the burgh, the claim to petty customs would not be affected by the change of road.

The first question therefore is, whether the meaning of this clause is that the tenant is to continue to pay petty customs, or whether it means that he is to pay through customs although the goods did not come through the burgh. I agree with the Lord Ordinary that the latter is the true meaning of the clause. If the lands were within the burgh this obligation was unnecessary, because whether grain or other goods came

to the distillery through the burgh or by the new road petty customs would in either case have to be paid. But, on the other hand, if the mill-haugh was outwith the burgh, the goods brought by the new road would not require to enter the burgh, and thus no "through" customs would be exigible in the absence of express stipulation. The minute of date August 12, 1815, does not, as I read it, conflict with this interpretation. The words goods "going to the town" are equivalent to "brought into and through the town." I do not hold that by reason of their predecessors having granted a title in these terms the pursuers are precluded from now raising the question whether the mill-haugh is really within the burgh, but the fact that they thought it necessary in 1815 and 1826 to stipulate as they did is strong evidence that they then understood that the lands were not within the burgh.

If this is the true construction of the clause, it carries with it other very important results. It has a material bearing on another question raised in the case, viz., whether it has been proved that by immemorial usage the mill-haugh has been treated as part of the burgh proper. The leading fact which is relied on in support of this contention is that the owners of the distillery have throughout paid *customs*. That is not disputed; but from 1815 until 1884 *through customs* were exigible under the lease and feu-disposition; and as *through customs* on grain imported to the distillery were of precisely the same amount as *petty customs*, I think that the defenders are well entitled to assume that such payments were made in respect of the obligation in their title. There is really no dispute as to the identity of the amount. John Brook, one of the pursuers' aged witnesses, says that petty customs and causeway mail were precisely the same; and Robert Porteous, another of the pursuers' aged witnesses says—"Before the abolition of the causeway mail in 1884 I do not think that any distinction was ever taken between petty customs and causeway mail. If Bernard & Company or their predecessors had not paid petty customs they would have had to pay causeway mail. Prior to 1884 I do not think any question could possibly have arisen between the town and the defenders." The receipts granted showed no distinction.

It is true that since 1884, or at least since 1887, the defenders continued until 1898 to pay customs. But this was under an intelligible misapprehension and in ignorance or forgetfulness of the terms of their titles. The period is well within the period of prescription.

Evidence has been led which bulks largely in the proof as to the understanding of inhabitants of Haddington still living that the defenders' lands were within the burgh. When it is examined, it appears to rest on no satisfactory foundation. In the first place, no real question with the defenders or their authors arose until the present case began; secondly, the river Tyne appears to be a natural boundary on the south; thirdly, it was known that the owners of the distillery had throughout paid customs which were erroneously supposed to be petty customs; and lastly (what may have weighed chiefly with the witnesses), the magistrates in 1842 remitted to a subcommittee to report as to the boundaries of the burgh, and in the plan on which the result of their inquiries was shown the mill-haugh was included within the burgh boundaries. Now at that date the owners of the distillery had no interest to object, and I do not find that the committee who made the inquiry had before them any other or better means of information than we have now, or than their predecessors had in 1815 and 1826.

In conclusion, I may observe that it is remarkable that in no single document is the mill-haugh described as lying within the burgh of Haddington, and even when the premises were exposed for sale in 1836 they were described as situated "in the immediate vicinity of the town and within the county of Haddington."

I cannot say that the case is free from doubt, but I am not satisfied that the pursuers have succeeded in establishing the foundation of their action, viz., that the defenders' lands are within the limits of the burgh. I am therefore of opinion that the result at which the Lord Ordinary has arrived is right.

On 20th November 1900 their Lordships of the Second Division pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Stormonth Darling, dated 7th March 1900, Recal the said interlocutor reclaimed against: Find and declare in terms of the declaratory conclusions of the action: And ordain the defenders to make payment to the pursuer James Thomson of the sum of £42, 10s. 9d. sterling, with interest thereon at the rate of five per centum per annum since the date of citation, as concluded for; and decern: Find the pursuers entitled to expenses, and remit, &c.

The defenders appealed to the House of Lords.

At delivering judgment—

LORD ROBERTSON—The main question in this case, although not the only one, is whether the property of the appellants called Distillery Park is within the royal burgh of Haddington.

Now, the reliance of the respondents is primarily on the terms of their charter of novodamus and confirmation granted in 1624 by King James the Sixth of Scotland, and the respondents say that the lands in question are by that charter made part of the burgh. It is admitted that those lands are part of what in the charter is called "miln haugh and miln lands," and your Lordships have therefore to consider what does the charter do with the "miln haugh and miln lands."

The charter, it is to be observed, is granted to an existing royal burgh, and is primarily intended to give it a fresh title to

all its properties and jurisdictions, the former titles having been lost "by the injury of time and several conflagrations" during the wars between England and Scotland. Accordingly there is a new erection of the burgh, and the lands belonging to the burgh, alike those within the walls and the extraneous properties which had been acquired by the burgh, being resigned for a fresh grant, they are granted of new. Both at your Lordships' bar and in the Court below there has been much argument as to the original boundaries of the burgh before the charter of 1624, and as to whether the miln haugh and miln lands, and several other pieces of land which are mentioned by name in the charter of 1624, had or had not been within those ancient boundaries. Those questions, however, are completely superseded, so far as the present controversy is concerned, if the charter of 1624 by its own force makes those lands part of the re-erected burgh, and it is therefore unnecessary to enter into those more archaic inquiries.

Now, on the terms of the charter I am satisfied that the disputed lands were made part of the burgh.

It is true that in the clause of erection "the other lands," including the miln haugh and miln lands, are distinguished from "the lands lying within the burgh roods and territory of the said burgh," but not the less are those "other lands" just as much as "the said burgh" the objective of the words "we make, constitute, create, erect, and incorporate into an entire and free royal burgh in all times to come, to be called, as in times past, the burgh of Haddington." Proceeding with an examination of the charter of 1624 we have clauses of resignation and novodamus exactly appropriate to the occasion, the burgh and all its several enumerated properties being the subjects of this fresh grant.

Now, on full consideration of those clauses I cannot say that any part of them causes me to doubt of the effect of the clause of erection as making the miln haugh and miln lands part of the newly erected burgh. But if any such doubt had arisen, it must surely give way to the *tenendas* clause and the clause about sasine which immediately precedes. For the *tenendas* clause naming once more (in the catalogue of lands) the miln haugh and miln lands, declares that those lands are to be held in free burgage, fee, and heritage for ever, and the sasine clause ordains that one sasine taken at the market cross at Haddington will be a sufficient sasine for the whole of the lands, and again the mill lands are named among them. It is thus certain that so soon as the grant in the royal charter of 1624 was made the lands now in dispute were held burgage. I do not think that the importance of these clauses was exaggerated by the learned counsel for the respondents. According to the system of Scotch titles it is paradoxical to assert of any land that it is held burgage but is not and has never been within a burgh, and it would be equally flagrant to advise the Sovereign to ordain in a charter that one sasine should suffice for lands held burgage and lands held feu.

The result which I come to is that from 1624 the lands now in question were within the burgh of Haddington. The terms of the charter being in my judgment decisive I need not examine the other evidence, much if not all of which seems to me entirely inconclusive.

It has, however, been suggested that, assuming the lands in question to have been made part of the burgh in 1624, the charter did not confer on the magistrates right to levy customs outside the old burgh boundaries. I am unable to adopt this view. The words of grant, "with all the . . . customs and other privileges and immunities anciently belonging to the said burgh of Haddington," define the customs to be levied, but neither those words nor the words in the confirmation limit the area of their exaction by magistrates who *ex hypothesi* were to administer over the whole extended area. The whole scheme of erection points to equal and common rights and duties within the new burgh, which in the conception of the charter is so completely identified with its predecessor that it is "to be called, as in times past, the burgh of Haddington." It is indeed difficult to suppose, on the one hand, that certain burgesses were endowed with the privileges and exempted from the burdens of townsmen, and on the other that the king reserved to the Crown right to exact customs within the newly erected burgh.

The lands now in question remained vested in the magistrates until 1821, and down to 1815 were waste ground used only by the inhabitants for bleaching clothes. Accordingly, down to 1815 no question about customs could arise, as there was nothing on which customs could be exacted, and the absence of such exaction could have no effect in creating immunity for anyone who in the future might come to trade on the ground.

Now, in 1815 the authors of the appellants took a long lease of the land for the purpose of building a distillery; trade has ever since been carried on there, and from 1815 down to 1898 dues have been paid to the burgh. I use this neutral term "dues" because the appellants maintain that they have never paid customs, and that what they have paid was a pactional rate of the nature of causeway mail, the burgh's right to which arose not from their own charter of 1624 but from stipulations in the lease and in the subsequent feu-right granted to the appellants' author. They go on to say that, this duty being of the nature of causeway mail, they were absolved from liability to pay it by the Roads and Bridges (Scotland) Act 1878, and that they continued to pay it only from an error as to their legal rights.

The precise point of the appellants is that the lease of 1815 provided that the burgh should aid in getting a new road made to the distillery, but as this road would divert traffic which otherwise would have passed through the burgh and paid causeway mail,

it was agreed that the like dues should be paid on goods using the new road. The appellants say that this provision was useless if their property was within the burgh, for they would then have been liable for ordinary petty customs on the same goods whichever road they used, and the petty customs and causeway mail being of the same amount the one was as good as the other.

The Lord Ordinary adopted the appellants' view, and rested his judgment on the lease of 1815 and feu-disposition of 1826. His Lordship found, in the provisions in those documents of a rate on goods going to their distillery by a new road, decisive evidence that the lands in question were treated as being not within the burgh.

Lord Stormonth Darling's view is stated with great clearness; and if the question whether in fact the appellants' lands were within the burgh could be answered in the negative, or left unanswered, there is great plausibility in his theory. But it does not appear that his attention had been directed to the very important clauses of the charter of 1624, which I have found to be decisive of that question. And once we know that the lands were within the burgh in 1815, the deeds then and subsequently executed are necessarily read in a different light from what falls on them if that question were obscure. The clause agreeing to the duty on goods taken by the new road is then to be read not as the voluntary undertaking of a pactional rate, but merely as the application (for greater clearness) to a new road of a burden which would have had to be paid whichever road was adopted. I think the clause is open to the objection that it is superfluous, and I concede that if I regarded the question whether the lands were within the burgh as being open, this would count as a considerable aid to the argument for a negative answer. But I cannot regard the provision as repugnant to the conclusion that the lands were within the burgh.

The appellants' argument on the lease of 1815 and the feu-charter of 1826 does not however end here. They say that what is stipulated in those instruments, and what was paid under them, was a through custom; that by this stipulation the burgh have given up their right to incoming customs, and that they have by disuse lost their right to exact incoming customs. The facts bearing on this point require attention, the more so as the evidence relevant to it seems to have been presented to the Court *alio intuitu*. The result is that the appellants themselves have proved decisively (1) that the through customs and the incoming customs were identically the same in amount; and (2) that according to usage both those customs were not exigible on the same load of goods, but only one or other. It is true that one of the respondents' witnesses said that the through customs were not always of the same amount as the petty customs, but this evidence is entirely overborne by the concurrent testimony of the appellants' witnesses. In this state of the facts I see no room for the appellants' argument. The clause in the lease and feu-disposition providing for payments on goods coming by the new road, assuming in the appellants' favour that it provided a causeway mail, did not of itself imply an immunity from incoming customs which might thereafter come to be due, nor did the acceptance of through customs and the abstaining from at the same time exacting incoming customs when it is proved that incoming customs were not then exigible, imply a relinquishment of the right to incoming customs when they should become due owing to the cesser of through customs.

On these grounds, some of which do not seem to have been so much discussed before the Lord Ordinary or the Second Division as they were at your Lordships' bar, I am of opinion that the appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN — I have had the advantage of reading in print and considering the judgment which has just been delivered by my noble and learned friend Lord Robertson, and I desire to express my entire concurrence in it.

LORD DAVEY—I also concur in the judgment of my noble and learned friend opposite (Lord Robertson), and I will only say in a very few words how the question presents itself to my mind.

I am of opinion that no sound legal distinction can be made with respect to the tenure of what has been called the burgh proper and the territory which it is suggested by the appellants was annexed to the burgh by the charter of novodamus of 1624. I agree with the learned Judges in the Inner House that whether the territory in question was or was not part of the ancient burgh prior to the date of the charter, it was by the charter incorporated with and made part of the royalty of the burgh. The question, therefore, on the ultimate analysis of the case presented by the appellants, comes to be whether the "customs anciently belonging to the burgh" were by the charter made leviable in the royalty as constituted by the charter or within the ancient limits of the burgh only. On this point I think that according to the true construction of the charter the right to levy customs of the kind and character anciently belonging to the burgh was regranted or confirmed to the burgh; but there is nothing in the charter to confine the exercise of the right within the ancient limits of the royalty. It is therefore immaterial to consider the much discussed question whether the territory in question was or was not within the ancient limits, but I am far from saying it is proved that it was not.

The Lord Ordinary decided the case in favour of the appellants on consideration of the clause in the tack of 1815. There may have been, and apparently were, doubts as to the extent of the rights of the burgh, and the clause may have been inserted *ex majore cautela*. But at the outside it is evidence of nothing more than that the

parties then believed that the customs would not be exigible without an express contract. They may have been mistaken, and their successors are certainly not estopped or precluded thereby from now asserting their real title.

From what I have said it follows that in my opinion the customs claimed are not a causeway mail within the definition in section 3 of the Act of 1878, or abolished by section 33 of that Act.

LORD BRAMPTON — Some time ago I availed myself of the opportunity afforded me to read and carefully to consider the judgment which has been delivered by my noble and learned friend Lord Robertson, with this result—that I so entirely concur in the view he has stated and in the reasons he has given for the conclusions at which he has arrived, that I could not usefully add one word beyond an expression of my concurrence in that judgment.

LORD LINDLEY—I have carefully studied these charters and documents, and I have come to the conclusion that the judgment of my noble and learned friend Lord Robertson is unanswerable and absolutely right.

LORD CHANCELLOR—I also concur.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for the Pursuers, Reclaimers, and Respondents—Lord Advocate (Graham Murray, K.C.)—Clyde, K.C. Agent—John Kennedy, for Strathern & Blair, W.S.

Counsel for the Defenders, Respondents, and Appellants—Asquith, K.C.—Ure, K.C. —Deas. Agents—Faithfull & Owen, for Davidson & Syme, W.S.

Tuesday, December 17.

(Before The Lord Chancellor (Halsbury), Lord Shand, Lord Davey, Lord Brampton, and Lord Robertson.)

YOUNG'S TRUSTEES *v.* YOUNG'S TRUSTEE.

(*Ante*, December 14, 1900, vol. xxxviii. p. 209; and 3 F. 274.)

Succession—Testament—Trust—Vagueness—Uncertainty—Bequest for such Charitable or Public Purposes as my Trustee Thinks Proper—Charitable Bequest.

A testatrix by a codicil to her last will and testament directed that in a certain event which happened the half of the residue should "be applied for such charitable or public purposes as my trustee thinks proper."

Held (*affirming* the judgment of the Second Division) that this direction was invalid on the ground of vagueness and uncertainty.

This case is reported *ante, ut supra.*

Miss Agnes Young's trustee, defender and respondent in the Court of Session, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case I do not propose to repeat what I said at some length in the *Commissioners for Special Purposes of Income-Tax* v. *Pemsel* ([1891], A.C. 531, at p. 539), nor do I think it is necessary to appeal to the decision in that case for the purpose of the decision of this. I will only say that in my view the decision of that case is an authoritative determination, and in speaking of a Taxing Act which applies to both countries the decision of that case must of course be supreme. But speaking of a Scotch instrument and the interpretation to be given to the word "charitable" in Scotland, I should regard the decision of *Baird's Trustees* (15 R. 682, 25 S.L.R. 533) as still an authoritative exposition of the law of Scotland. I am not quite certain that it is important to consider that question at any length here, because in the view that I take of this particular testamentary disposition it appears to me that it is impossible to deny that the words on which the main question turns, namely, "charitable or public," are used disjunctively. Under those circumstances it appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A B to determine what particular public purposes should be the objects of the trust is too vague and too uncertain for any Court either in England or Scotland to administer. The result of that is, as it appears to me, that the decision of the Court below was perfectly right, and I move your Lordships therefore that this appeal be dismissed, with costs.

LORD SHAND—I am of the same opinion. The whole argument of the appellant was founded on the alleged analogy between a bequest for public purposes and a bequest for charitable and benevolent purposes which are objects of peculiar favour in the law both of Scotland and of England. In my opinion the analogy clearly fails, and I concur in thinking that a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest.

I will only add that I concur in the judgment of my noble and learned friend Lord Robertson, which my noble and learned friend has given me the opportunity of reading and considering.

LORD DAVEY—The short question on this appeal is whether a trust for such "charitable or public purposes" as the executor may select is a valid disposition of the testator's property according to the law of Scotland, or is void for uncertainty.

Your Lordships were exhorted by the Lord Advocate to dismiss from your minds all preconceived notions derived from the English law of charities, and I have done my best to humbly obey that exhortation. There is no doubt that the English law has attached a wide and somewhat artificial